

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

77-1435

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X
UNITED STATES OF AMERICA,

Appellee,

-against-

LAVANNE ELAINE HAMMOND and
MILLCENT JONES,

Appellants.
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: To be argued by
: Richard E. Pieder

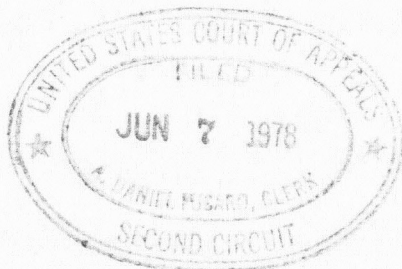
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: Docket No. 77-1435
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BRIEF FOR APPELLANT LAVANNE ELAINE HAMMOND

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ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



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STATUTES INVOLVED

21 U.S.C. § 878

Any officer or employee of the Bureau of Narcotics and Dangerous Drug designated by the Attorney General may -

- (1) carry firearms;
- (2) execute and serve search warrants, administrative inspection warrants, subpoenas, and summonses issued under the authority of the United States;
- (3) make arrests without warrant (A) for any offense against the United States committed in his presence, or (B) for any felony, cognizable under the laws of the United States, if he has probable cause to believe that the person to be arrested has committed or is committing a felony;
- (4) make seizures of property pursuant to the provisions of this subchapter; and
- (5) perform such other law enforcement duties as the Attorney General may designate.

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BRIEF FOR APPELLANT LAVANNE ELAINE HAMMOND

ON APPEAL FROM A JUDGMENT
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FOR THE SOUTHERN DISTRICT OF NEW YORK

QUESTIONS PRESENTED

1. Whether the Fourth Amendment prohibited appellant Hammond's warrantless arrest made within her home and without exigent circumstances.

2. Whether, pursuant to Rule 28(i), F.R.Ap.P., appellant Hammond adopts any factual statement or legal argument made by co-appellant Jones which is not consistent with appellant Hammond's interests on this appeal.

STATEMENT PURSUANT TO RULE 28(a)(3)

PRELIMINARY STATEMENT

This is an appeal from a judgment of the United States District Court for the Southern District of New York (the Honorable Constance Baker Motley) entered November 15, 1977 after a jury trial, convicting appellant Lavanne Elaine Hammond of conspiracy to distribute or possess with intent to distribute heroin in violation of 21 U.S.C. §§ 812, 841(a)(1) and 841(b)(1)(A). The court imposed a sentence of two years in prison, suspended sentence, and placed appellant on probation for three years.

By an order dated April 19, 1978, Richard E. Rieder, Esq. was appointed counsel for appellant Hammond for the purposes of this appeal.

STATEMENT OF FACTS

Appellant Lavanne Elaine Hammond, a mother of three children and Millicent Jones were indicted (77 Crim. 386)* in the Southern District of New York for one count of conspiracy to distribute and possess with intent to distribute heroin in violation of §§ 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code. The period of the alleged conspiracy was from January 1, 1977 to May 20, 1977.

Appellant and her co-defendant were tried together before the Honorable Constance Baker Motley and a jury, the proceeding commencing on September 20, 1977. Both appellants were found guilty by the jury on September 29, 1977. Appellant Hammond was sentenced to a prison term of two years. The sentence was suspended and she was placed on probation for a period of three years.

The indictment charged appellant Hammond with one conversation concerning the sale of one-eighth of a kilogram of heroin for \$7,000. No sale was ever consummated and neither defendant was ever found to be in possession of narcotics, although drug paraphernalia was found in Hammond's home as a result of a search which is the subject of this appeal.

*The indictment is Exhibit B to the separate Appendix of appellant Hammond.

The Trial

A. Evidence Of The Conspiracy

On the evening of April 14, 1977 Gerald Franciosa, a Drug Enforcement Administration ("DEA") agent, met with an informer named Connie. (T*26) Connie made arrangements for Franciosa to meet appellant Jones, presumably to purchase narcotics. (T27) That evening Franciosa and another agent, Robert Palumbo, went to Jones' apartment posing as buyers of 1/8 kilogram of heroin. Palumbo waited in the car. (T247) Franciosa discussed purchasing the heroin including the price of \$7,000 with Jones. (T28)

While agent Franciosa was in Jones' apartment, appellant Hammond arrived. Franciosa discussed the purchase of heroin with her. She indicated that if he was interested in heroin he should give her the \$7,000 they offered to pay. He refused. (T29-31) Franciosa indicated he wanted the heroin brought to the apartment. Miss Hammond left saying she would speak to her "husband." (T31,32) She left the apartment and was met nearby by a black male. They walked off together. (T 248) Miss Jones later received a telephone a telephone call from appellant Hammond while the agents were still in her apartment. Miss Jones said Hammond had told her that her "husband" would not come to the apartment.

Later that same evening Miss Jones placed a call to a male individual. He talked directly to agent Franciosa who was

*Numerals in parentheses preceded by "T" refer to pages of the trial transcript, Exhibit D to the separate Appendix of appellant Hammond.

still in her apartment and said he wanted the money first or else "there wouldn't be any narcotics." (T41)

On April 15, 1977 agents Franciosa and Palumbo went back to Miss Jones' apartment. (T43) While there, Franciosa spoke on the telephone to the same male he had spoken to before. The man asked Franciosa to count out the \$7,000 in front of Miss Jones. Agent Palumbo counted out only \$2,900. The man then said the deal was off. (T43-45) Later that night Franciosa called Miss Jones to indicate a continued interest in the purchase of heroin. (T46) Miss Jones said the male involved did not want to talk about it. (T46).

On April 18, 1977 Franciosa again called Miss Jones and said he was still interested. (T46,48)

On April 27, 1977 Franciosa called Miss Jones and he and Palumbo again returned to her apartment. (T75) Agent Palumbo counted out the \$7,000 in front of Miss Jones. Miss Jones then placed a phone call to the male Franciosa had spoken to on April 14th and 15th. He indicated some distrust of agent Franciosa. Agent Franciosa offered to call appellant Hammond and speak to her to reassure her that he was trustworthy. He did so. (T75-79)

Later Miss Jones left the apartment presumably to pick up the heroin. (T80) Evidently, however, the heroin was not delivered because the area around Miss Jones' apartment was sur-

rounded by police. (T81) As a result of the refusal of the heroin supplier to deliver the heroin, agents Franciosa and Palumbo "terminated the operation." (T83)

B. The Arrest

Basil Hansen, a fugitive who had escaped from the Metropolitan Correctional Center, had been under surveillance by the FBI and DEA agents for some time prior to May 3, 1977. (TSH*37-40) On May 3, 1977 he was observed entering 3528 Doreimer Avenue, Bronx, New York, (TSH 38), by another DEA agent, James Greenan. He had been identified as being at that address on April 27, 1977. (TSH 39-40)

On May 3, 1977 agents Greenan and Franciosa began a surveillance of 3528 Doreimer Avenue at about 1:00 in the afternoon. (TSH 41) Shortly after that time appellant Hammond entered that address. (TSH 41) Later she left, returning at about 3:30. (TSH 74)

At approximately 5:00 that afternoon, agents Greenan and Franciosa, supported by five to ten other agents, (TSH 64, T196), knocked on the door of 3528 Doreimer Avenue. (TSH 42) Appellant Hammond answered the knock from the second-story window. (TSH 43-44) Agent Greenan with his gun drawn (TSH 65) told her that they were searching for a fugitive and ordered her to come down and open the door. She did so. (TSH 44) At that time

*Numerals in parentheses preceded by "TSH" refer to the transcript of the suppression hearing held September 20 and 21, 1977. Defense counsel moved to suppress the evidence seized at appellant Hammond's home on May 3, 1977. That motion was denied by Judge Motley. (TSH September 21, 1977, pages not numbered) The "TSH" pages referred to our Exhibit E to the separate Appendix of appellant Hammo

five agents entered the house and conducted a search (TSH 44, 67)

After the search, agent Greenan left the residence to confer with agent Franciosa. (TSH 46) He returned shortly thereafter and found appellant Hammond in the kitchen and placed her under arrest for "conspiracy to violate federal narcotics laws." (TSH 47) He then searched her pocketbook, which was on the kitchen table, looking "for a weapon." (TSH 47) He removed from the pocketbook three leases and a driver's license.

The leases were for three different apartments in the Bronx. (TSH 53) The driver's license was in the name Yolanda Williams also with a Bronx address. (TSH 48) The driver's license was admitted into evidence as Government's Exhibit 3. (T289) One of the leases, a lease covering 3528 Doreimer Avenue, was introduced into evidence as Government's Exhibit 7A. (T290) At approximately 5:30 or 6:00 appellant Hammond was transported to the DEA's regional office. (TSH 51)

After appellant Hammond left, four or five of the agents decided to remain in or around 3528 Doreimer Avenue. Later that night at about midnight or one o'clock (T195) they decided to conduct another search of the house. At that time agent Franciosa discovered a trap door in a closet. (T193) Behind that door he found articles of men's clothing, a selective service card and a social security card in the name of Basil Hansen, glassine

envelopes and measuring spoons. (T291) A picture of the trap door was admitted in evidence (T291) as were the glassine envelopes. (T435)

The agents had a warrant for the arrest of Basil Hansen. (TSH 62) They did not have a warrant for the arrest of appellant Hammond. They also did not have a warrant to search the house. (TSH 88) Appellant Hammond lived in the house at 3528 Doreimer Avenue. (TSH 103) She had leased it in the name of Elaine Hobson in February 1977 and was identified at trial as the leasee by the rental agent. (T 440)

Appellant Hammond did not testify at trial.

C. The Summation

The assistant U.S. Attorney relied heavily upon the evidence obtained as a result of the search of appellant Hammond's house. A car rented in the name of Yolanda Williams, the name on the driver's license found in Hammond's purse, was referred to as being in the neighborhood of Miss Jones' apartment. (T530) The drug paraphernalia and the photographs of the trap door were referred to as being evidence of Hammond's involvement with narcotics. (T 538):

"What do we find in the house which the defendant Hammond we submit tries to conceal as her residence. Among other things we find Government Exhibit 8, which we know to be a common cutting agents and they also find among other things boxes of glassine envelopes and measuring spoons, items which we submit to you are the paraphernalia for the wrapping, cutting and

spooning of the heroin which the defendants conspire to sell. Incidentally, on cross-examination of Agent Greenan and of Mr. Lurie, the chemist, the defendants have attempted to show him the white powder and measuring spoons of common uses.

"Ladies and gentlemen, we submit to you, would you keep medicine and common measuring spoons from a kitchen inside a trapped door concealed upstairs in your house in a closet? Take a look at the trap. There are photographs of the trap and they are Government Exhibits 4A and B in evidence. We submit, ladies and gentlemen, you may find these items were the paraphernalia for the wrapping and spooning and cutting of the heroin.

"Of course we know that the defendant Elaine Hammond lived at 3528 DeReimer Avenue despite we submit was the obvious attempt to conceal that fact. The agents told us and Mr. Dixon told us. He came here and brought us the original lease, the copy of which Agent Greenan testified he took from the defendant Hammond's pocketbook and you can look at the two leases, the one Mr. Dixon brought, and the copy taken out of defendant Hammond's pocketbook, Government Exhibits 7A and 7B. Mr. Dixon also told us he gave the defendant Hammond the keys after she had rented the premises and he had shown her in fact the premises.

"You will recall, ladies and gentlemen, the defense tried to show maybe defendant Hammond didn't actually sign the lease. Why? Because they can't live with that proof."

The lease was relied upon to prove that Hammond lived in the house where the drug paraphernalia was found and was cited as evidence that she had used her house in narcotics trafficking. And the glassine envelopes and measuring spoons were again referred to as conclusive evidence of conspiracy (T 548):

"The sixth piece of evidence, ladies and gentlemen, the use of the phony names by the defendant Hammond. Why did she tell Mr. Dixon in early February of 1977 that her name was Elaine Hobson? The lease at 3528 DeReimer Avenue, ladies and gentlemen, that is; the defendant Hammond's pocketbook and the original Mr. Dixon brought with him. There were two other leases outstanding. Did she live in three apartments or as we submit to you was there the house which she had under a false name to use in the narcotics trafficking?

"And the telephone connected at the DeReimer Avenue address. What is the name there. Lorraine Edwards. The driver's license: Yolanda Williams.

"Did the defendant Hammond in early April of 1977 begin a plot, conspiracy to rip off these agents, the agents she didn't know or was she as the grand jury charged engaged in an ongoing conspiracy to sell heroin?

"Ladies and gentlemen, what did the agents find inside the house? They found the trap door in the bedroom closet at DeReimer Avenue and the white powder which Mr. Lowry told us about and glassine envelopes and measuring spoons. Was this part of the conspiracy to steal \$7,000 from the agents, concealed in the trap door of the closet? We submit, ladies and gentlemen, it defies all logic and belief.

"Ladies and gentlemen, these are just some of the pieces of evidence which I suggest to you, samples of the evidence which we submit totally negates any claim here that these defendants were conspiring to rob the agents. We submit you can yourself think of many, many more from the evidence."

ARGUMENT

POINT I

THE FOURTH AMENDMENT PROHIBITED
APPELLANT HAMMOND'S WARRANTLESS
ARREST MADE WITHIN HER HOME AND
WITHOUT EXISTING CIRCUMSTANCES

Appellant Hammond was arrested in her home without a warrant. As her last contact with federal authorities had been nearly a week previous to her arrest and her house had been under surveillance for at least four hours prior to her arrest, there were no exigent circumstances for her arrest. Such an arrest is unconstitutional. Reed v. United States, ___ F.2d ___, Nos. 486, 487 Slip Opinion pp. 2395-2423 (2d Cir., April 11, 1978).

In Reed Judge Meskill stated: "We hold that warrantless felony arrests by federal agents effected in the suspect's home, in the absence of exigent circumstances, even when based upon statutory authority and probable cause, are unconstitutional." (at 2404). Assuming that the arrest of appellant Hammond was based upon statutory authority and probable cause it was made in her home and not occasioned by exigent circumstances.

In Reed the government proved that Reed was involved in three separate sales of heroin to an undercover agent employed by the DEA. Following the third sale the agent negotiated for a fourth sale but the transaction was not completed. Two-and-a-half months later Reed was arrested in her apartment. The agents had neither an arrest or a search warrant. The arrest was accomplished by knocking on the door of the apartment and there arresting Reed

when she opened it.

After Reed was arrested the agents seized two of her personal telephone or address books which contained the names of individuals alleged to be sources of narcotics. They were introduced by the government at trial. Although after her arrest Reed made oral and written statements, the Court held that it did not believe beyond a reasonable doubt that the introduction of the telephone books at trial was harmless error (at 2418).

Place of Arrest

The circumstances of the arrest of Hammond are very similar to those of Reed. Hammond was upstairs in her home when the agents approached. She was not exposed to public view, speech, hearing or touch or on the threshold of her house as the individual held to be in a public place in United States v. Santana, 427 U.S. 38 (1976). Instead, she, like Reed, opened the door of her house when the DEA agents shouted at her to do so. Like Reed, she was in her home - a private place protected by the Fourth Amendment.

Lack of Exigent Circumstances

The Court in Reed (at 2417) recited the criteria set forth by the District of Columbia Circuit in Dorman v. United States, 435 F.2d 385, 392-93) (D.C. Cir., 1970) (en banc) and adopted by this Court in United States v. Jarvis, 560 F.2d 494 (2d Cir., 1977), regarding whether "exigent circumstances"

are present. The factors "include (1) the gravity or violent nature of the offense with which the suspect is to be charged; (2) whether the suspect 'is reasonably believed to be armed'; (3) 'a clear showing of probable cause... to believe that the suspect committed the crime'; (4) 'strong reason to believe that the suspect is in the premises being entered'; (5) 'a likelihood that the suspect will escape if not swiftly apprehended'; and (6) the peaceful circumstances of the entry." Under these criteria Hammond's arrest, like Reed's, did not involve exigent circumstances.

1. The Gravity or Violent
Nature of the Offense

Reed had sold heroin, Hammond had only negotiated for such a sale. Indeed, the evidence is that she was at most a middleman in the negotiations. She only met with the agents on one occasion and then only to relay their funds to "the male individual" involved, presumably Hansen.

2. Belief That The
Suspect Is Armed

There is no evidence that Hammond was reasonably believed to be armed regardless of agent Greenan's search of her purse for a weapon. Weapons had not been mentioned as a concern by any of the agents with respect to Hammond. In fact, there is no evidence that Hammond was viewed as being any more dangerous than Reed. She was a pregnant woman in her own home. And no weapons were found.

3. Probable Cause

Here, as in Reed the DEA agents had probable cause to arrest Hammond.

4. Suspicion That Suspect
Is On The Premises

It is conceded that appellant Hammond was at her home during the day of May 3, 1977. However, the facts show that the agents surveilling the building were more concerned with Hansen, the fugitive for whom they had a warrant, than Hammond. And while he too was seen entering the house in the afternoon, he was not found there. Her arrest appears to have been an afterthought and may have mistakenly been originally for harboring a fugitive.

5. Likelihood of Escape
By Reason of Delay

Six days was sufficient in Jarvis to obtain a warrant. It should be sufficient here also. Hammond's last contact with the DEA agents was on April 27, 1977, exactly six days before her arrest.

6. Peaceful Entry

The entry here is for all practical purposes identical to the entry in Reed. In fact, it probably was more frightening. Greenan said a dozen agents participated. Five entered the house led by Greenan with his gun drawn and immediately searched it before arresting Hammond. Obviously this array of manpower was intended to and did convey the impression of overwhelming force.

The similarities between this case and Reed are striking. The crimes charged are identical except Reed was charged with sale and Hammond with conspiracy. The arrests are similar except Hammond's was accomplished with more force. Certainly the time during which a warrant could have been obtained, although less than the two months in Reed was adequate under the Jarvis standard. And, finally, nothing changed with respect to Hammond between April 27th and May 3rd to justify a warrantless arrest.

Accordingly, as in Reed, this Court should hold appellant Hammond's arrest to be violation of the statute 21 U.S.C. § 878 and the Fourth Amendment.

It follows, as Judge Meskill stated in Reed (at 2418) that if the arrest was unlawful the Government is precluded from justifying the seizure of the lease, the license and the paraphernalia on either the "plain view" or "search incident to arrest" exceptions to the search warrant requirement of the Fourth Amendment. The evidence should be suppressed.

That the jury ascribed substantial weight to the license, the lease and the paraphernalia is evident from the importance placed upon them by the Government. The Assistant United States Attorney referred to the lease and the paraphernalia twice in her summation (T 538, 539, 549) and characterized the evidence the Government had presented against Hammond as overwhelming. (T 558) The other conspiracy evidence against Hammond, however, consisted only of one meeting between Hammond and Franciosa and a later telephone call during which she did little more than tell agent Franciosa

that her husband was unwilling to sell any narcotics to him.

In sum the license, lease and paraphernalia evidence was relied upon to show that Hammond had access to narcotics, similar to the use made of the telephone or address books in Reed. Moreover, they were relied upon to show that she was in conspiracy with others to hide that fact. Those items are an essential part of the fabric of the Government's case. As such, their admission in evidence cannot be said beyond a reasonable doubt to be harmless error. See Chapman v. California, 386 U.S. 18, 24 (1966) and Fahy v. Connecticut, 375 U.S. 85 (1963). The conviction should be reversed.

Judge Motley's Opinion

Judge Motley's opinion with respect to the suppression of the evidence was issued on September 21, 1977 before Reed was decided. She appears to have based her decision with respect to the admissibility of the lease and license upon her belief that the agents had probable cause to arrest Hammond. They may have had such cause, but as Reed holds the arrest was violative of the Fourth Amendment and therefore illegal. Those items may not, therefore, be suppressed on that basis.

Her decision with respect to the paraphernalia appears to be based upon the fact that the agents had an arrest warrant for Hansen and therefore did not need a search warrant. She relied on the following cases: United States v. Brown, 467 F.2d 419 (D.C. Cir., 1972); Fisher v. Volz, 496 F.2d 333 (3rd Cir. 1974); United States v. McKinney, 379 F.2d 259 (6th Cir., 1967);

and Rice v. Wolff, 513 F.2d 1280 (8th Cir., 1975) rev'd on other grounds, 428 U.S. 465 (1976).

Those cases do not, however, hold that evidence seized in the home of a person as a result of an attempt to arrest a third party pursuant to an arrest warrant can be used against the resident of the home. In Brown, supra, the Circuit Court for the District of Columbia held that under the "peculiar circumstances" of that case there was probable cause to believe Brown was in an apartment and therefore the evidence seized during the search of that apartment to arrest him pursuant to an arrest warrant could be used against him (467 F.2d at 420). The Court did not address the question as to whether such evidence could be used against the resident of the home. In fact, it appears she was not prosecuted. See United States v. Brown, 520 F.2d 1106, 1109 fn. 12 (D.C. Cir. 1975).

Moreover, Brown has been distinguished by the Circuit Court for the District of Columbia. In United States v. Ford, 553 F.2d 146 (1977), a case involving the suppression of electronic surveillance evidence, Judge Wright stated (fn. 45 at 159):

"In Brown the court relied on Dorman v. United States...in which warrantless entry to effect arrest was held permissible in those precisely defined circumstances which essentially embody the meaning of exigency.

. . . .

Therefore, the ratio decidendi of Brown is not persuasive in the present case. Though the court did not specifically re-

fer to exigency, it is clear that the very involvement of arrest provides some urgency...and that there were present in Brown certain facts (a number of previous efforts to effect arrest) which are absent here and which contributed to compelling need."

The Court in Ford, *supra*, went on to interpret another of the decisions relied upon by Judge Motley, Fisher v. Volz, *supra**, as also requiring probable cause and exigent circumstances, 553 F.2d at 159 fn. 45. That there were no exigent circumstances here at least with respect to Hammond, is apparent from Reed. And although Judge Motley found that there was probable cause to believe Hansen was in Hammond's house, she made no finding with respect to exigent circumstances necessitating his arrest therein. In fact, the evidence indicates that he had been observed coming and going by the police for some time providing them with ample opportunity to arrest him.

United States v. McKinney, *supra*, is also distinguishable, if not inopposit. There a fugitive was arrested in the home of a third party pursuant to an arrest warrant. The Court held that a search warrant was not necessary to search the home to execute the arrest warrant. However, it stated in a footnote (379 F.2d at 263 fn. 1):

"We limit our consideration here to a search for the person named in the arrest warrant. The trial judge in the instant case granted a motion to suppress any physical evidence not in the immediate

*Fisher was a civil rights case seeking damages against police officers for wrongful searches of apartments.

control of Baker [the fugitive found in the home], and we do not suggest he erred in so doing."

As Hansen was not found in Hammond's home, McKinney would appear to support the suppression of the evidence seized in her home.

The final case relied upon by Judge Motley, Rice v. Wolff, supra, involved a search ancillary to the execution of an arrest warrant. The court held that (513 F.2d at 1291):

"Police entry into a private dwelling without a search warrant in search of a suspect for whom an arrest warrant has been issued carries the same fourth amendment implications as entry into a dwelling to make warrantless search for tangible property."

The Court discussed whether the police had probable cause to believe the fugitive was in the home. Finding that lacking, the Court did not reach the question as to whether exigent circumstances were also required (513 F.2d at 1292 fn. 7) and rejected the argument that the exigent circumstances shown reduced the degree of probable cause required (513 F.2d at 1294). The decision can therefore be read as a precursor of the doctrine set forth in Ford and Reed requiring probable cause and exigent circumstances. And as shown above, exigent circumstances were not found by the District Court.

In summary, Judge Motley's decision is not supported by the cases cited and in this instance is contravened by Reed. Should this Court determine, however, that the effect of the admission in evidence of the lease and the license upon the jury can be separated from the paraphernalia, under Ford a determina-

tion would still be required as to the exigent circumstances necessitating the search for Hansen. But that would not end the matter. Assuming such circumstances were present, a further decision would have to be made that the evidence discovered can be used against Hammond, a fine distinguishment of Reed, and a decision inopposit to the dictum in McKinney that only the evidence in the immediate control of the fugitive could be admitted. Such distinctions would undermine the clear precedent of Reed.

POINT II

PURSUANT TO RULE 28(i), F.R.Ap.P., APPELLANT
HAMMOND ADOPTS ANY FACTUAL STATEMENT OR
LEGAL ARGUMENT MADE BY CO-APPELLANT JONES
WHICH IS NOT INCONSISTENT WITH
APPELLANT HAMMOND'S INTERESTS ON THIS APPEAL

CONCLUSION

For the above-stated reasons, Appellant Hammond's conviction should be reversed and a new trial ordered.

Respectfully submitted,

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